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No. 00-454

Supreme Court, U.S.
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In The

Supreme Court of the United States

ATKINSON TRADING COMPANY, INC.,

Petitioner,

v.

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JOE SHIRLEY, JR., VICTOR JOE, DERRICK B. WATCHMAN, and ELROY DRAKE, Members of the Navajo Tax Commission; and STEVEN C. BEGAY, Executive Director of the Navajo Tax Commission,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Tenth Circuit

BRIEF OF THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY; THE SPIRIT LAKE TRIBE; THE SISSETON-WAHPETON SIOUX TRIBE; THE GRAND PORTAGE BAND OF CHIPPEWA; AND THE SAC & FOX TRIBE OF THE MISSISSIPPI IN IOWA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

ANDREW M. SMALL,
Counsel of Record
STEVEN F. OLSON
SUSAN L. ALLEN
JEFFREY S. RASMUSSEN
BLUEDOG, OLSON & SMALL, P.L.L.P.
Southgate Office Plaza, Suite 500
5001 West 80th Street
Minneapolis, Minnesota 55437
Telephone (952) 893-1813

Attorneys for Amici Curiae

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INTERESTS OF *AMICI CURIAE*

The Shakopee Mdewakanton Sioux (Dakota) Community, the Sisseton-Wahpeton Sioux Tribe, the Spirit Sioux Lake Tribe, the Grand Portage Band of Chippewa Indians, and the Sac and Fox Tribe of the Mississippi in Iowa, are federally-recognized Indian tribes, exercising inherent powers of self-government.[1]

Amici represent a broad range of tribal government interests, and have various land ownership histories. All reservation lands of the Grand Portage Band, Spirit Lake Tribe and Sisseton-Wahpeton Sioux Tribe include lands owned by non-Indians in fee. All reservation lands of the Shakopee Mdewakanton Sioux (Dakota) Community and Sac & Fox of the Mississippi in Iowa are held by the United States in trust for the respective tribes.

The presence and activities of non-Indians within these Tribes' reservation boundaries creates a substantial need, both actual and potential, for tribal governmental services. A wide range of governmental services are afforded by *Amici* to all non-tribal members on reservation lands, including police, fire, emergency medical, housing, education, financial and in-kind assistance. At issue here is the power of *Amici* to govern and to raise revenues to pay for the increased costs of government resulting from the activities of non-Indians on reservation lands. Thus, *Amici* strongly support Respondent, the Navajo Nation.

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[1] Pursuant to Rule 37.6 of this Court, no counsel for a party has authored this brief, in whole or in part. No person or entity, other than amicus curiae, its members or counsel, have made any monetary contribution to the preparation or submission of this brief.

All parties have consented by joint written stipulation to the filing of this Amicus Brief.

SUMMARY OF ARGUMENT

Amici agree with the Navajo Nation that this Court's decision in Montana v. United States, 450 U.S. 544 (1981), does not apply to the present matter. The Navajo Nation's hotel occupancy tax is imposed strictly for revenue-raising purposes, and therefore does not involve the assertion of regulatory jurisdiction over petitioner's guests. The Tribe's tax is imposed for the purposes of promoting tourism and tourism development, a simple revenue measure that benefits petitioner and its guests.

The source of the Tribe's power to tax non-Indians "derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction." Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982). Because the activities of petitioner's guests affect the Tribe's ability to operate its government, the Tribe has a significant interest in raising revenues to defray the costs of providing governmental services that benefit petitioner's guests. The application of Montana to limit tribal taxing authority in this case would directly interfere with the Navajo Nation's power to fund and deliver essential governmental services, and would divest the Nation of a fundamental aspect of sovereignty.

All of Petitioner's guests voluntarily enter the Navajo Reservation and remain within the Navajo Nation's protection. There is substantial evidence that governmental services provided by the Tribe benefit the non-members subject to the

tax, and thus the non-Indian activity is "relevantly related to the tribe's tax. Atkinson Trading Co. v. Shirley, 210 F.3d 1247, 1263 (10th Cir. 2000). The operation of Petitioner's business and the activities of its guests have a substantial connection to the Navajo Nation, its members and its lands. The Navajo Nation's provision of services which benefit petitioner's guests, its involvement and interest in promoting tourism activities within reservation boundaries, and the impact of tourism on the Tribe's ability to govern all establish the necessary connection between the taxpayer and the Tribe.

I. MONTANA IS NOT CONTROLLING PRECEDENT BECAUSE THE NAVAJO NATION'S REGULATORY AUTHORITY IS NOT AT ISSUE.

There is a logical basis for distinguishing an Indian tribe's power to impose a tax from its power to regulate non-Indian activity on fee lands. This Court has confirmed tax schemes may be entirely revenue-raising in nature. Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 158-59 (1980). The Navajo Nation's hotel occupancy tax is a simple revenue measure unrelated to any regulatory purpose, and thus does not concern the source and extent of the power of an Indian tribe to regulate the use of non-Indian fee land. The Navajo Nation is not attempting to "regulate, through taxation," the performance of activities on non-Indian fee lands, nor impair any rights pertaining to non-Indian fee lands, Montana, 450 U.S. at 565-66,[2] it is simply

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[2] Amicus Curiae, Proper Economic Resource Management, Inc., submit that a ruling in favor of the Navajo Nation will subject non-members conducting businesses on fee lands to claims of tribal regulation that infringe upon civil and property rights of non-Indians. Unlike Montana and Brendale, this case does not involve a situation where the individual property rights of a non-Indians are affected. *See* Montana, 450 U.S. at 544; *see also* Brendale

engaged in raising general revenues for the operation of government.

A. *The Navajo Nation's authority to tax non-Indians is of a different character than the Navajo Nation's authority to regulate non-Indian activity on fee lands.*

Unlike Montana, this case is not concerned with the boundaries between state and tribal regulatory authority. In Montana, the State asserted its authority to regulate hunting and fishing by non-Indians within the reservation. 450 U.S. at 549. And, unlike Strate v. A-1 Contractors, principles that define the boundaries between state and tribal adjudicatory jurisdiction are not at issue here. 520 U.S. 438, 442 (1997) (holding that a civil action between non-members "falls within state or federal regulatory and adjudicatory governance"). Imposition of the Navajo Nation's hotel occupancy tax does not intrude on any regulatory area occupied by state or federal government.

While conflict between tribal and state regulatory structures requires analysis to determine which sovereign will regulate certain activity, in "the field of taxation . . . the laws of both State and Tribe may be enforced simultaneously." Gila River Indian Community v. Waddell, 91 F.3d 1232, 1237 (9th Cir. 1996); *see also* Colville, 447 U.S. at 158 (holding that dual systems of pure taxation are not inherently conflicting); Chickasaw Nation v. Oklahoma Tax Comm'n, 31 F.3d 964, 968 (10th Cir. 1994) ("[w]here the taxation is an integral part of the overall regulatory structure in a traditionally heavily regulated area, as opposed to a simple revenue measure, the tax

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v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989).

may properly be considered to be regulatory and to fall within the regulatory authority."). This Court long ago formulated a distinction between taxes and regulatory fees in Head Money Cases (Edye v. Robertson), 112 U.S. 580, 589-90 (1884). There, the Court held that, unlike tax revenue, money raised by regulatory fees "is appropriated in advance to the uses of the statute, and does not go to the general support of the government." Id., at 595-96.

Taxes imposed for regulatory purposes can only be imposed upon those persons and activities subject to the regulatory jurisdiction of the taxing authority. San Juan Cellular Telephone Co. v. Public Service Comm'n of Puerto Rico, 967 F.2d 683, 685 (1st Cir. 1992).

> The classic 'regulatory fee' is imposed by an agency upon those subject to its regulation. It may service regulatory purposes directly by, for example, deliberately discouraging particular conduct by making it more expensive. Or, it may service such purposes indirectly by, for example, raising money placed in a special fund to help defray the agency's regulation-related expenses.

Id. (citations omitted); *Accord* Chicago & N. Western Transp. v. Webster County, 71 F.3d 265, 267 (8th Cir. 1995). Both in definition and in its application, the Navajo Nation's hotel occupancy tax is imposed strictly as a revenue raising measure and not as an exercise of civil regulatory jurisdiction over Petitioner's guests.

Given that the hotel occupancy tax is imposed strictly for revenue-raising purposes, and therefore does not require the assertion of regulatory jurisdiction over Petitioner's guests, the

Navajo Nation's general interest in raising revenues to defray the costs of providing services that benefit Petitioner's guests is sufficient. This Court has recognized that the validity of a tax is determined by its purpose. *See* Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 514 (1937). The district court found that "the Navajo Hotel Occupancy Tax "is imposed for the purposes of promoting tourism and tourism development," a benefit to Appellant and its guests . . . . " Atkinson, 210 F.3d at 1262 n.13. The tourism department of the Navajo Nation actively promotes tourism in the Cameron area. Id. Tourism has a direct impact on the Navajo Nation's ability to operate its government and manage its territory. The undisputed facts in this case are that the Navajo Nation is the primary provider of governmental services to Petitioner and its guests. Petitioner wrongly focuses on the fact that, fortunately, these services are not often needed, while the courts below correctly emphasize that tribal services are available to all guests and the Navajo Nation maintains its readiness to assist any guest who needs services. *See* Thomas v. Gay, 169 U.S. 264 (1898) (holding that "benefits always flow from the appropriation of public moneys to such purposes, which corporations in common with natural persons receive in the additional security to their property and profits.").

B. *The power to tax derives from fundamental sovereignty.*

In Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), this Court held that the "power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." Id., at 137. The source of the power to tax non-Indians does not "derive fully from the Indian tribe's power to exclude non-Indians from tribal lands." Rather, the power to tax "derives from the tribe's general authority, as sovereign, to control

economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from person or enterprises engaged in economic activities within that jurisdiction." Merrion, 455 U.S. at 137.

The source of the Tribe's authority to tax was at issue in Merrion, because the Navajo Nation lacked the power to exclude the non-members from tribal lands under leases entered into with the Navajo Nation. Merrion relies on Buster v. Wright, 135 F. 947 (8th Cir. 1905), to dispense with "the theory that the tribes' taxing authority derives solely from the power to exclude non-Indians from tribal lands." Id. at 143. In both Merrion and Buster, each tribe lacked the power to exclude non-Indians. In Buster, the court concluded that "[n]either the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of municipalities, nor by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners." 135 F. at 952. As noted in Merrion, "[e]ven though the ownership of land and the creation of local governments by non-Indians established their legitimate presence on Indian land, the [Buster] court held that the Tribe retained its power to tax." Merrion, 455 U.S. at 143, *citing* Buster, 135 F. at 952. Thus, the Court in Merrion stated that the result in Buster "confirms that the Tribe's authority to tax derives not from its power to exclude, but from its power to govern and to raise revenues to pay for the costs of government." Id. at 144.[3] Like the tribes

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[3] The Court noted that both the classic treatise on Indian Law, F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW at 142 (1982 ed.), and its subsequent revision by the Department of the Interior, Federal Indian Law at 438 (1958), cite Buster v. Wright "for the proposition that the power to tax is an inherent sovereign power not dependent on the power to exclude." Merrion, 455 U.S. at 144.

in Merrion and Buster, the source of the Navajo Nation's power to tax Petitioner's guests derives not from the power to exclude, but from its inherent "power to govern and to raise revenues to pay for the costs of government." Id.

In Colville, the Court found no implicit divestiture of the tribe's power to tax non-Indians, because it saw "no overriding federal interest that would necessarily be frustrated by tribal taxation." 447 U.S. at 154.[4] The Court observed that "federal courts also have acknowledged tribal power to tax non-Indians entering the reservation to engage in economic activity." Id. at 153, *citing* Buster v. Wright, 135 F. 947, 950 (8th Cir. 1905). The Court's understanding that federal law "has not worked a divestiture of Indian taxing power" was based in part on an opinion of the Solicitor of the Department of the Interior.

> Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe and over nonmembers, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions.

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[4] Although Colville dealt with taxation of non-Indian activities occurring on trust lands, the Court cited with approval Buster v. Wright and Morris v. Hitchcock, 194 U.S. 384 (1903), each of which involved taxation of non-Indian activities on fee lands. 447 U.S. 153. In Colville, "the Court's rationale requires a tribal interest in the subject matter to justify a tribal tax. Use of trust land supplies such an interest; on fee land the interest must be based on other circumstances." F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW at 434 n.27 (1982 ed.).

Colville, 447 U.S. at 152-53, *Powers of Indian Tribes*, 55 I.D. 14, 46 (1934).

II. INHERENT TRIBAL TAXING AUTHORITY CANNOT BE ABROGATED BY IMPLICATION OR JUDICIAL FIAT.

Because a fundamental distinction exists between the power to tax and the power to regulate, and in view of the absence of any exercise of regulatory jurisdiction by the Navajo Nation in this case, Montana is not applicable here.

In light of the Navajo Nations' unique *domestic* sovereign status, the federal government has assumed vital responsibilities of protection and trust. Those responsibilities demand that federal policies supporting the exercise of inherent tribal powers be addressed when considering tribal taxing authority.[5] Further, because the tribal authority to tax is a fundamental attribute of sovereignty, it cannot be defeated by implication, but only express Congressional action.

A. *The power to tax is vital to tribal self-government.*

As this Court noted in New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983), the Federal Government is "firmly committed to the goal of promoting tribal self-government." Id., at 334-335, *citing* Indian Financing Act

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[5] In Strate, this Court held that a determination of tribal sovereignty must be made by the court before invoking the Montana test. *See* Strate, 520 U.S. at 449, *citing* National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 855-56 (1985) (the existence and scope of tribal jurisdiction " will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.").

of 1974, 88 Stat. 77, 25 U.S.C. § 1451 et seq.; *see also* Fort Berthold Reservation v. Wold Eng'g., P.C., 476 U.S. 877, 890 (1986) (referring to "Congress' jealous regard for Indian self-governance"). This Court acknowledged that "[t]he power to tax members and non-Indians alike is surely an essential attribute of such self-government; the Navajos can gain independence from the Federal Government only by financing their own police force, schools, and social programs." Kerr-McGee Corp. v. Navaho Tribe of Indians, 471 U.S. 195, 201 (1985).[6] As is well established by Congressional action and this Court's decisions, the power to tax is a vital component of federal policy that supports the exercise of inherent sovereign powers. As this Court stated in Merrion, "the views of the three federal branches of government, as well as general principles of taxation, confirm that Indian tribes enjoy authority to finance their governmental services through taxation of non-Indians who benefit from those services." 455 U.S. at 140. The application of Montana to constrain the Navajo Nation's power to tax non-Indians who benefit from significant governmental services, is at odds with important federal policy and this Court's decisions.

B. *Fundamental attributes of retained inherent sovereignty can only be divested by Congress.*

As discussed above, this Court has repeatedly recognized that tribes retain the inherent sovereign power to tax

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[6] The exercise of the power to tax is essential to Indian self-determination, which is a cornerstone of federal Indian policy. *See, e.g.*, 25 U.S.C. § 450(a) (Indian Self-Determination and Education Assistance Act) ("The Congress ... finds that ... the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons."); 25 U.S.C. §§ 461-479 (Indian Reorganization Act) (a congressional policy encouraging tribal self-determination).

non-members. *See* Merrion, 455 U.S. at 137; Colville, 447 U.S. at 152-54. The inherent authority of tribal government over reservation lands cannot be taken away except by Congress. United States v. Mazurie, 419 U.S. 558 (1975). "One of the powers essential to the maintenance of any government is the power to levy taxes. That this power is an inherent attribute of tribal sovereignty which continues unless withdrawn or limited by treaty or by act of Congress is a proposition which has never been successfully disputed." COHEN at 142, *citing* Buster v. Wright, *supra*, and Morris v. Hitchcock, 194 U.S. 384 (1903). "A fundamental principle of inherent tribal sovereignty is that it can only be limited when it has been expressly or implicitly divested by Congress." Williams v. Lee, 358 U.S. 217, 223 (1959) ("If this power is to be taken away from them, it is for Congress to do it."); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978). In the absence of "clear indications" that Congress has deprived the Navajo Nation of its power to impose the hotel occupancy tax, the Navajo Nation retains that power. *See* Merrion, 455 U.S. at 152.

Courts, whether federal or state, lack the authority to diminish inherent tribal sovereignty. Only Congress has plenary authority over Indian tribes, Escondido Mutual Water Co. v. La Jolla Bands of Mission Indians, 466 U.S. 765, 788, n. 30 (1984) ("all aspects of Indian sovereignty are subject to defeasance by Congress"), and can "limit, modify, or eliminate" altogether the inherent sovereignty of Indian tribes, Santa Clara Pueblo, 436 U.S. at 56.[7] The jurisdiction of federal courts is

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[7]This authority is primarily conferred by the Indian Commerce Clause, Art. I, sec. 8, cl. 3, United States Constitution, United States v. Wheeler, 435 U.S. 313, 322-23 (1978), and, to a lesser extent, by the Treaty Clause, Art. II, sec 2, United States Constitution.

not co-extensive with the authority of Congress to limit tribal sovereignty. Because the constitution grants to Congress singular power to diminish or abrogate tribal rights altogether, this Court has been hesitant to act to diminish inherent attributes of tribal sovereignty absent clear congressional expressions of intent, and has said, ". . . until Congress acts, the tribes retain their existing sovereign powers." Wheeler, 435 U.S. at 323. "Because tribes retain all inherent aspects of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact." Merrion, 455 U.S. at 149 n.14. Further, "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that [the Court] tread lightly in the absence of clear indications of legislative intent." Santa Clara Pueblo, 436 U.S. at 60.

The application of Montana to limit tribal taxing authority in this case would directly interfere with the Navajo Nation's power to fund and deliver governmental services and provide "'the advantages of a civilized society' that are assured by the existence of tribal government." Merrion, 455 U.S. at 137-38 In Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc., this Court upheld the doctrine of tribal sovereign immunity "on the theory that Congress had failed to abrogate it in order to promote economic development and tribal self-sufficiency." 523 U.S. 751, 757 (1998), *citing* Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe, 498 U.S. 505, 510 (1991). In deference to Congress' role in "reforming tribal immunity," the Court declined to confine sovereign immunity to transactions on reservations or to noncommercial activities. Id., at 759-60. The Court stated: "Congress, subject to constitutional limitations, can alter its limits through explicit legislation. . . . Congress is in a position to weigh and accommodate the competing policy concerns and

reliance interest. The capacity of the Legislative Branch to address the issue by comprehensive legislation counsels some caution by us in this area." Id., at 757. The Court noted that on occasion Congress has authorized suits against Indian tribes and "has always been at liberty to dispense with such tribal immunity or to limit it." Id., at 759. Caution and deference to the role of Congress is required here, because the power to tax is a fundamental attribute of sovereignty and Congress has not acted to limit or divest Indian tribes of such authority.

III. THE PROPER ANALYTICAL FRAMEWORK HERE IS THE NEXUS OF THE TAX IMPOSED TO THE BENEFITS ACTUALLY OR POTENTIALLY DERIVED FROM THE GOVERNMENT IMPOSING THE TAX.

Both Colville and Merrion recognized that before a tribe has jurisdiction to exercise its sovereign authority and tax activities involving non-Indians, there must be a nexus between the tribe and the non-Indian activity. *See* Coville, 447 U.S. at 152; Merrion, 455 U.S. at 137. Here, the nexus of the activity subject to the tax imposed does not involve the legal status of the land. Indeed, this Court has never attempted to scrutinize the situs of every aspect of non-member activity when recognizing tribal taxing authority. *See* Id. at 144 (holding that the tribe's "authority to tax derives not from its power to exclude, but from its power to govern and to raise revenues to pay for the costs of government.").

A. *There is a substantial relationship between the subjects and benefits of the hotel occupancy tax.*

Petitioner urges that the Navajo Nation is required to establish a formal consensual relationship, such as a contract, with every hotel guest before imposing its hotel occupancy tax.

Montana's first exception is concerned with due process, although Congressional policy with respect to Indian tribes, not the constitutionality of the tax, is involved. If due process concerns are relevant, this Court's process of limiting tribal taxing authority should adhere to other jurisdictional precepts applicable to state taxing authority. In the context of taxation, no formal gesture of consent is required to establish state or federal jurisdiction over non-citizens. The assertion of state taxing authority merely requires "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax . . . . " Miller Brothers Co. v. Maryland, 347 U.S. 340, 344-345 (1954). Moreover, denial of the right to participate in the political process has never been construed to wholly divest the exercise of sovereignty over the excluded class. *See* Duro v. Reina, 495 U.S. 676, 707 (1990) (Brennan, J., dissenting) (stating that participation in the political process has never been held to be a "prerequisite to exercise of criminal jurisdiction by a sovereign").

This Court previously held that "[w]hatever place consent may have in contractual matters and in the creation of democratic governments, it has little if any role in measuring the validity of an exercise of legitimate sovereign authority." Merrion, 455 U.S. at 147. Because the power to tax derives from tribal sovereignty itself, Merrion, 455 U.S. 130, Colville, 447 U.S. 134, the Tenth Circuit properly applied a test that requires an examination of "the nature of the relationship between [Petitioner's] guests and the Tribe and the extent to which the Tribe provides services to those guests while they are on the reservation, compared to the burden place on those guests by the [Hotel Occupancy Tax]." Atkinson, 210 F.3d at 1255 (citation omitted). The availability and provision of services to Petitioner's guests by the Navajo Nation, the Navajo Nation's involvement and interest in promoting tourism activities within reservation boundaries, and the impact of

tourism on the Navajo Nation's ability to govern all establish the necessary connection between the taxpayer and the Navajo Nation. This case does not involve a situation where the Navajo Nation has had nothing to do with the non-member's activity, "save tax it." Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 186 (1989).

The Tenth Circuit held that by entering the Navajo Nation Reservation and "availing themselves of the services provided by the Tribe," Petitioner's guests submitted to tribal taxing jurisdiction. Atkinson, 210 F.3d at 1263 (holding that the non-members consensual relationship "is one of implied consent, or privilege and tax, similar to that set forth in Buster"). "In sum, the Tribe provides [Petitioner's] overnight guests with the 'benefits of civilized society' while the guests are present, and the presence of the guests creates a greater need, both actual and potential, for tribal services." Id. This approach is consistent with this Court's treatment of taxing authority, generally. The broad inquiry is "whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return." Asarco, Inc. v. Idaho State Tax Comm'n, 458 U.S. 307, 315 (1982) (citation omitted).

A concept of tribal sovereignty requiring consent from individuals before a tribe would be permitted to exercise its authority to tax, does not recognize inherent powers of self-government over territory and the persons within it, and relegates tribes to little more than private, voluntary organizations. Chief Justice John Marshall recognized that tribal sovereignty includes a geographic component. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 538-40 (1832); Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 457 (1989) ("tribal sovereignty is in large part

geographically determined"); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 151 (1980) (observing that the Court has repeatedly recognized a significant geographical element to tribal sovereignty).

If the consensual relationship requirement was controlling, non-Indians could easily defeat a tribal tax by extinguishing all direct commercial contact with the tribe. Yet, the Navajo Nation affords opportunities, benefits, and protection to all non-Indian tourists within the exterior boundaries of its Reservation, regardless of whether any tourist has a first-hand relationship with the Navajo Nation. Unless the Navajo Nation can collect the hotel occupancy tax, Petitioner and its guests (as well as all others conducting business in Indian country) will capitalize upon the opportunity to receive the benefits of government without sharing the cost of tribal government. The Navajo Nation's power to generate revenue for essential governmental services cannot be diminished or abrogated simply because the non-Indian has not formally consented to the tribal tax.

Indian tribes have a significant interest in raising revenues for essential governmental programs "when the revenues are derived from value generated on the reservation by activities involving the Tribe and when the taxpayer is the recipient of tribal services." Colville, 447 U.S. at 156-57. Here, the value taxed by the hotel occupancy tax is generated from and dependent on the geographic location of Petitioner's business within Indian country, trade with Tribal members, the development of tourism by the Navajo Nation, the close proximity to a Tribal member labor force, as well as the "advantages of a civilized society assured by the existence of tribal government." Merrion, 455 U.S. at 137-38. The increased burden on tribal government and drain on tribal resources resulting from the presence and activities of

Petitioner's guests within the boundaries of the Reservation gives the Navajo Nation a substantial interest in imposing its tax. *See e.g.,* Crow Tribe of Indians v. State of Montana, 650 F.2d 1104, 1114 (9th Cir. 1981) (the court recognized that a state's legitimate revenue-raising interests include unquantifiable interests such as "strains on state and local governments to provide roads, schools, utilities, fire and police protection, recreation and health facilities, and other more subtle benefits such as a trained work force and an organized government and system of laws").

This is not a case of minimal contact between the activity taxed and the taxing jurisdiction. The operation of Petitioner's business and the activities of its guests have a substantial connection to the Navajo Nation, its members and its lands. Petitioner's trading post houses a large collection of Navajo arts and crafts, its restaurant serves Navajo foods, and its hotel guests are invited to enjoy the tribal ambiance of the trading post, which has a long history of trading with Tribal members. It would not comport with principles of fairness and justice to allow a business enterprise, whose overriding business purpose has been the maximum exploitation of Indian commerce and tribal-related tourism, to engage in activities free from tribal taxing authority simply because direct physical contacts with the Navajo Nation have been reduced to a minimum. This is not a case where the Navajo Nation attempts to appropriate a portion of the value of Petitioner's business activities that has no relationship to the benefit it provides.

B. ***If this Court must decide this case under a test not based on Merrion, the result reached by the Tenth Circuit should be upheld.***

This Court's most recent pronouncement on the Montana test is Strate, 520 U.S. at 438. In Strate, this Court held that a tribal court did not have jurisdiction over a tort which occurred on a state highway running through a reservation. The District Court, the Court of Appeals, and Petitioner all interpret the above holding in Strate to mean that there must be a nexus between the Navajo Nation and the transaction at issue. District Court Opinion at 13; Atkinson, 210 F.3d at 1263; Petitioner's Brief at 33. Both courts found that there was a nexus between the tax at issue and the services rendered by the Navajo Nation. The Court of Appeals stated "that activity [of Petitioner and its guests] is relevantly related to the Tribe's tax," Atkinson, 210 F.3d at 1263, and that Petitioner "made no attempt to argue that there was a great disparity between the amount of the tax paid and the services provided by the Tribe." Id. at 1265. The District Court held the tax was related to "activities to which the tribe's services are relevant." District Court Op. at 17.

The Tenth Circuit was clearly correct that there was a nexus between the activities of Petitioner's guests and the Navajo Nation. Obviously there is a greater risk of crime, of harm from fires, of accidents, and of medical emergencies at Petitioner's business than there would be if it did not have guests at its facility. Petitioner's guests require services, not just from Petitioner, but from local governments, including the Navajo Nation. "[T]he presence of the guests creates a greater

need, both actual and potential, for tribal services." District Court Op. at 16.[8]

Petitioner asserts that the nexus can only exist if the Navajo Nation rents the motel room to the guest. Petitioner's Brief at 33. If this Court adopts Petitioner's argument, the Court would effectively nullify tribal taxing authority over non-Indians activities on fee lands. Under Petitioner's argument, Montana's first exception only allows the Navajo Nation to tax a transaction to which it is an explicit party. But, of course, if the Navajo Nation were a party, it would not tax the transaction, for the Tribe would be taxing itself.

Petitioner asserts that, so long as its guests do not contract with the Navajo Nation, and so long as the burden they place on the Navajo Nation is not so severe that it "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the Tribe," Montana, 450 U.S. at 566,[9] they are free to burden the Navajo Nation's infrastructure and budget, without the Tribe being able to recoup the costs of the services to fee land within its Reservation.[10] As the District Court correctly noted, "Where

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[8] Petitioner argues that the provision of emergency services to non-members cannot establish a consensual relationship between the Navajo Nation and the non-members. Petitioner's only case citation for this argument is Strate, although Petitioner simultaneously acknowledges that the issue was neither presented by the facts in Strate nor ruled upon by this Court. Petitioner's brief at 35.

[9] As discussed below, the second Montana exception is not currently before this Court. *See* Section IV of this brief.

[10] Contrary to Petitioner's assertion, the fact that it and its guests are not tribal members supports the Tenth Circuit's decision. As Petitioner notes, it, and most of its guests, do not have the requisite political relationship with the United States government to qualify for the services which the United

a tribe provides essential services within Indian Country, even to nonmembers and even on fee land ... fairness indicates that it be allowed to impose taxes to help pay for those services." District Court Op. at 13. As the Tenth Circuit correctly held, regardless of whether the second Montana exception applies, the Navajo Nation is able to adopt a tax which recovers the costs of those services, at least so long as the tax "is not disproportionate to the benefits which [Petitioner's guests] receive." Atkinson, 210 F.3d at 1264.

C. *Petitioner concedes that a consensual relationship exists between it and some tribal members and between some of its guests and the Navajo Nation.*

Petitioner asks this Court to rule that it need not collect the hotel occupancy tax because some, but not all, of its guests do not have a consensual relationship with the Navajo Nation. While Amicus Tribes contend that all guests have the requisite relationship and so all guests must pay the tax, the issue in this case is whether Petitioner must collect the tax. Petitioner asked for a declaratory judgment that it should never be required to collect the tax.

The undisputed facts demonstrate that some of Petitioner's guests have the requisite relationship. Petitioner states that its business is "almost exclusively with non-members of the Navajo Nation." Petitioner's Brief at 2, *citing* Pet. App. 96a. *See also*, District Court Op. at 8 (finding that

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States government properly provides to Navajo Indians and which the Navajo Nation provides to its members. Instead, Petitioner brashly argues that they should receive those benefits of being an Indian, without having the requisite relationship and without having to pay a tax which is reasonably related to the benefits they receive.

plaintiff asserted that "most of its guests" were non-members). Implicit in this statement is that some of Petitioner's business is with Tribal members. Petitioner asks this Court to assume, without any factual record, that all of its guests have no consensual relationship to the Navajo Nation, even though the hotel is on the Navajo Reservation, most of the people who live in the area are Navajo, and the Navajo Nation promotes tribal and other on-reservation tourist attractions.

Petitioner further admits that federal anti-discrimination law would prevent it from discriminating against Navajo tribal members, and so tribal members may continue to rent rooms after this Court decides this case. Petitioner's Brief at 32 n.22. Petitioner states that, "[O]f course, federal equal employment law" prohibits Petitioner from discriminating against applicants who are Navajo. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

Under the fact presented by this case, there are lawful applications of the tribal hotel occupancy tax, and those lawful exercises of authority are clearly within the Navajo Nation's retained inherent authority under both Montana and Merrion. Therefore, Petitioner's requested remedy, that Petitioner never needs to comply with the obligation to collect and remit the tax, is clearly not appropriate. Judgment that Petitioner need not collect the tax would only be appropriate if *none* of Petitioner's guests had the requisite relationship.[11]

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[11] Further, as the record in this matter clearly shows, none of Petitioner's guests are parties to this action and none are challenging the Navajo Nation's authority to impose the tax. Petitioner can only make vague generalizations about the taxpayers and conjecture about the taxpayers' relationships with the Navajo Nation, but Petitioner cannot point to a single taxpayer who does not have a consensual relationship with the Navajo Nation, and who disputes, on the record here, the Navajo Nation's authority to impose the tax or the guests' obligation to pay it. Instead, Petitioner

IV. THE ISSUE OF WHETHER THE SECOND MONTANA EXCEPTION APPLIES IS NOT PROPERLY BEFORE THIS COURT BECAUSE THAT MATTER WAS NOT DECIDED BY EITHER THE DISTRICT COURT OR THE COURT OF APPEALS.

As clearly explained in footnote eight of the Tenth Circuit's decision, neither the District Court nor the Court of Appeals ruled upon whether the second Montana exception applied under the facts of this case. Nevertheless, Petitioner asks this Court to determine that the second Montana exception does not apply, Petitioner's Br. at §II.B., and then to "hold that the Navajo Nation may not apply its hotel occupancy tax to a transaction between nonmembers on fee land." Petitioner's Br. at 41.

The Navajo Supreme Court held that both Montana exceptions applied to the present case. Because the U.S. District Court held that the first Montana exception applied, there was no need to reach the issue of whether the second exception applied.

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disputes the burden imposed by its obligation to collect and remit the tax.

This Court should not issue an advisory opinion, based upon this record, regarding the duties of taxpayers who are not even part of this suit. Wilson v. Cook, 327 U.S. 474, 490 (1946) (holding it is improper for Court "to render an advisory opinion upon the validity of a tax of uncertain and speculative application."). The rule against advisory opinions is, of course, well-established. *See e.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998); Maryland Cas. Co. v. Pacific Cola & Oil Co., 312 U.S. 270 (1941); Hayburn's Case, 2 Dall. 408 (1792). If actual taxpayers complain, the Court will then be able to determine whether those taxpayers have consensual relationships.

> The district court did not rule out the possibility that the power to tax might arise from the second "significant-impacts" exception to the Montana rule. . . . The District Court appeared to condone the Navajo Supreme Court's conclusion [regarding the second Montana exception] . . .In our review of the District Court's opinion in this case, however, the applicability of the second exception to the Montana rule is not at issue. We therefore do not address its application to the Navajo Hotel Occupancy Tax.

Atkinson 210 F.3d at 1254 n.8.

Petitioner acknowledges that no federal court has ruled on whether the second Montana exception applies, Petitioner's Br. at 37 n.26, but, without legal analysis, asserts that this Court should be the first federal court to rule on whether the second Montana exception applies to the facts of this case.

This Court has consistently and repeatedly held that, "we do not decide in the first instance issues not decided below." National Collegiate Athletic Assn. v. Smith, 525 U.S. 459, 470 (1999); *see also*, Adickes v. S.H.Kress Co., 398 U.S. 144, 147 n.2. (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."). There is no lower court decision on the second Montana exception, therefore, this Court should not issue a ruling on the second Montana exception.

The issue which this Court accepted, but which this case does not present is: "Whether an Indian Tribe may tax a transaction occurring between two non-Indians on fee land within the Reservation." At most, Petitioner's brief presents the issue of whether the Navajo Nation has authority to tax

under the first Montana exception, and this Court therefore cannot reach any issue involving the second Montana exception.

CONCLUSION

For the reasons stated above, this Court should affirm the grant of summary judgment in favor of the Navajo Nation.

Respectfully submitted,
Andrew M. Small, *Counsel of Record*
Steven F. Olson
Susan L. Allen
Jeffrey S. Rasmussen
BlueDog, Olson & Small, P.L.L.P.
5001 West 80th Street, Suite 500
Minneapolis, Minnesota 55437
Telephone (952) 893-1813

Attorneys for *Amici Curiae*